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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-905

NICK SENAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 527 F.2d 129.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1975. On November 25, 1975, that court denied a petition for rehearing. The petition

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for a writ of certiorari was filed on December 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

18 U.S.C. 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

QUESTIONS PRESENTED

1. Whether a state-employed public defender, who willfully and knowingly deprived individuals of their property by threatening inadequate legal representation for indigent clients unless he was paid money,

acted under "color of law," in violation of 18 U.S.C. 242.

2. Whether, in such circumstances, a state-employed public defender deprived persons of property without due process of law, in violation of 18 U.S.C. 242.

3. Whether the admission in evidence of a witness' prior statement as past recollection recorded constituted plain error.

4. Whether a remark made by government counsel in closing argument deprived petitioner of a fair trial.

STATEMENT

Petitioner was charged in a five-count indictment with having used his office of public defender (or pauper's attorney) of the Lake County, Indiana, Criminal Court, to exact money from indigent clients or their relatives and friends, by conditioning adequate legal representation on the payment of such sums. The indictment[1] (Pet. App. 42-46) charged that petitioner, while acting under color of state law, willfully deprived persons of property without due process of law, in violation of 18 U.S.C. 242.

On motion of the petitioner, the district court dismissed the indictment for failure to state an offense.

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[1] This indictment was the second one filed by the United States. After the district court dismissed the first indictment for failure to state an offense, the grand jury returned the present, differently-worded indictment. See *United States* v. *Senak*, 477 F.2d 304, 306 (C.A. 7), certiorari denied, 414 U.S. 856.

The judgment of dismissal was reversed by the court of appeals, and the case was remanded for further proceedings. *United States* v. *Senak*, 477 F.2d 304 (C.A. 7), certiorari denied, 414 U.S. 856.

At the trial, the jury returned a verdict of guilty on two counts of the indictment (Counts II and IV) and not guilty on a third count (Count III) (Pet. App. 2).[2] The evidence elicited with respect to Counts II and IV established that, in each instance, petitioner had been appointed by a judge of the Criminal Court as pauper's attorney to represent an indigent client. While assigned as pauper's attorney, he demanded and received additional money from a relative and close friend, respectively, of each of the clients, by threatening to provide less than adequate legal representation if the sums were not paid. When the money he demanded was paid, petitioner withdrew his appearance as pauper's attorney and appeared as private counsel (Pet. App. 3-7).

The court of appeals affirmed the district court's judgment of conviction.

ARGUMENT

1. Petitioner contends (Pet. 9-12) that he was not acting "under color of law," within the meaning of 18 U.S.C. 242. This argument was properly rejected by the court of appeals prior to trial, on ap-

[2] The government had dismissed one other count prior to trial (Count V), and the district court granted petitioner's motion for judgment of acquittal as to Count I at the close of the government's case (Pet. App. 2).

peal by the government from the district court's order dismissing the present indictment (477 F.2d at 307), and this Court denied certiorari (414 U.S. 856). After trial, the court of appeals again considered this contention and again rejected it (Pet. App. 40).

Petitioner's claim is without substance. The evidence showed that petitioner was serving as a public defender or pauper's attorney of Lake County, Indiana, appointed pursuant to state law and paid a salary by the state (Burns Ind. Stat. Ann. 4-5715, 4-5716, 4-5717 (1968)), when he exacted monies from friends or relatives of his indigent clients (Pet. App. 3-7). It was only through petitioner's official position that he was able to perpetrate this scheme of obtaining money to which he was not entitled. Petitioner's conduct thus falls squarely within the test for action taken under color of law announced by this Court in *United States* v. *Classic*, 313 U.S. 299, 326:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

The cases cited by petitioner are inapposite. All involve allegations of malfeasance in the exercise of an attorney's professional duties toward his client. To hold, as the courts have, that an attorney's acts in the exercise of his professional responsibilities are not clothed with "color of law" simply because he serves as an officer of the court or as a salaried public defender is not to say that an attorney does not act under color of law when he uses a state salaried

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office to exact money illegally from a client. No contention is made here that petitioner was acting under color of law solely because he was an attorney or because he was a publicly paid attorney. The significance of his position as public defender is that it gave him the power and authority essential to the commission of the offense of which he was convicted: exacting funds illegally by threatening to withhold services or benefits from persons entitled, under state law, to receive them.

2. Petitioner's claim (Pet. 13-15) that there was no deprivation of property without due process of law has also been correctly rejected on two occasions by the court of appeals (477 F.2d at 307-309; Pet. App. 40-41). Petitioner now contends that, if upheld, the judgment of the court of appeals "would permit the Government to prosecute any State appointed or elected official for any breach of his duties * * * [and] would effectively nullify the provisions of the Tenth Amendment to the Constitution in that there would be virtually no police powers reserved to the States" (Pet. 15).

This argument is without merit. First, it implies that only conduct which does not violate state law should be considered a federal offense under 18 U.S.C. 242. This Court has consistently rejected that contention. *Monroe* v. *Pape*, 365 U.S. 167; *Screws* v. *United States*, 325 U.S. 91; *United States* v. *Classic*, *supra*. Second, petitioner's argument overlooks the fact that there are several elements of an offense under 18 U.S.C. 242, each of which the government must prove

beyond a reasonable doubt. Here, the district court clearly instructed the jury on these elements and on the government's burden of proof (see Pet. App. 36-37), and it thereby made plain that much more was required than merely the proof of "any breach" of an appointed or elected state official's duties.

As this Court stated in *Screws* v. *United States*, *supra*, 325 U.S. at 108, in answer to a similar contention:

> The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when someone is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses.

3. Petitioner contends (Pet. 15-16) that the admission of the statement of a witness to two FBI agents as "past recollection recorded" constituted reversible error. The court of appeals exhaustively considered and rejected all of petitioner's specific objections to the admission of this statement, including objections not raised in the district court (Pet. App. 11-23).

Petitioner's primary claim in this Court (Pet. 15) —that since the statement was made approximately three years after the events occurred, it was not "fresh" as required by Rule 803(5) of the Federal

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Rules of Evidence [3]—was not raised at trial. As the court of appeals recognized (Pet. App. 18), the fact that the statement was made three years after the event "was just as apparent at the time of the trial as it is now, yet at no time was this advanced as an objection * * * and there was no motion to strike the statement on that ground." Accordingly, "reversal would be required only if * * * there was error so plain and clear that Senak was denied a fair trial" (*id.* at 19).

After thoroughly considering the facts and the law (Pet. App. 19-23), the court concluded that the better rule is that "there should be no inflexible criteria for determining when a writing is so remote from the events described as to make it inadmissible" (Pet. App. 22). See also 3 Wigmore, *Evidence* § 745, p. 94 (Chadbourn ed. 1970); McCormick, *Evidence*, § 302, p. 714 (2d ed. 1972); *United States* v. *FMC Corp.*, 306 F. Supp. 1106, 1137-1138 (E.D. Pa.). Since the statement in question here was "specific in detail" (Pet. App. 23) and the witness was subjected to extensive cross-examination, the court of appeals properly concluded that it was not plain error for the district court to have permitted the introduction of the statement.

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[3] Although petitioner's trial occurred in October 1974 and the new Federal Rules of Evidence did not become effective until July 1, 1975, the district court had indicated—in accordance with the court of appeals' opinion in *United States* v. *McCarthy*, 445 F.2d 587, 591 (C.A. 7)—that it intended to apply the new Rules (Pet. App. 15).

The court of appeals also considered and rejected petitioner's suggestion (Pet. 15) that it was error for the district court to permit the statement to be taken into the jury room. Here again, no objection was made at trial to receiving the document as an exhibit rather than merely having it read into evidence, as Rule 803(5), Fed. R. Evid., now requires unless the statement is offered by an adverse party. On the contrary, petitioner's counsel objected to having the statement merely read to the jury, suggesting instead: "It's an exhibit and should be treated as any other exhibit, and going to the Jury Room as any other exhibit" (Pet. App. 15). In these circumstances, "to hold that the fact that the document did go into evidence as an exhibit was reversible error would be an overly technical application of a Rule not yet effective * * *" (*ibid.*) and would allow petitioner to benefit because his own suggestion assertedly led the court into plain error.

4. Petitioner's final contention (Pet. 16-18) is that a remark of government counsel in closing argument was an attempt "to tarnish Senak with the suggestions of income tax evasion" (Pet. 16), and was so prejudicial as to require the granting of a new trial.

As the court of appeals held (Pet. App. 9-11), however, when read in the context of the entire record, the remark in question did not have the significance, or even necessarily the meaning, attributed

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to it by the petitioner. Moreover, in view of the wide latitude allowed prosecuting attorneys in replying to arguments raised by defense counsel (*Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15; *United States* v. *Benter*, 457 F.2d 1174, 1176-1177 (C.A. 2); *United States* v. *Greenbank*, 491 F.2d 184, 188 (C.A. 9)), and viewing the argument as a whole, the remark in question did not deprive the petitioner of a fair trial. See, *e.g.*, *United States* v. *Greene*, 497 F.2d 1068, 1085 (C.A. 7), certiorari denied, 420 U.S. 909; *United States* v. *Cook*, 432 F.2d 1093, 1106-1108 (C.A. 7), certiorari denied, 401 U.S. 996; *Baiocchi* v. *United States*, 333 F.2d 32, 38 (C.A. 5).[4]

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[4] As the court of appeals stated (Pet. App. 10-11):

> The first reference to the use of a subpoena to secure records did not come from the Government but occurred during the redirect examination of Senak when his own attorney, during the course of putting a gloss on his client's openness, hiding-nothing attitude, asked Senak if they ever had to subpoena any of his records. All that the prosecutor said was that if one doesn't hand over the records he will be handed a subpoena. We do not agree with the defendant that this necessarily implies more than it says, *i.e.*, that he would have had to comply with a subpoena or summons. Under any circumstances, upon the issuance of a summons Senak would have found himself in the undesirable position for a lawyer of denying compliance because to do so might incriminate him.
>
> Colloquies of the sort which developed here mostly out of the fact that a substantial part of the defense was the good character of the defendant tend to resemble a snowball being pushed back and forth across an open field. The size and scope increase with each directional roll. In viewing this give-and-take which occurs in vigorously contested litigation, our principal inquiry is whether the

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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prosecutorial remarks deprived the defendant of a fair trial. * * * [B]earing in mind that the comment anent the subpoena was the culmination of the opening defense gambit that Senak did not require a subpoena to produce his records, we are not persuaded that the argument of the Government counsel brought about an unfair trial.

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